COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

John Doe, Plaintiff/Appellant, v. Travis Paul Grant, Mariel Lizette Grant, and Kyle David Grant, Defendants/Appellees.	No. 1 CA-CV 21-0302 Maricopa County Superior Court No. CV2021-090059

MOTION TO SUSPEND APPEAL AND REVEST JURISDICTION IN TRIAL COURT; ALTERNATIVE MOTION TO DISMISS APPEAL TO PERMIT PARTIES TO DEVELOP RECORD

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I. INTRODUCTION

This appeal involves a very unusual twist: the *prevailing parties* below (Defendants/Appellees Travis Grant, *et al*.) concede the Superior Court erred when it dismissed Plaintiff/Appellant John Doe's Complaint *sua sponte* and without notice. The only question is: what should be done about this error?

There are two possible options.

First, this appeal could proceed in the normal course. If that happens, and if Appellant prevails, the result will be a *nominal* reversal of the lower court's extremely narrow dismissal order. This outcome will have zero impact on the actual resolution of this case. Thus, "winning" this appeal would not mean Appellant "wins" the case, nor would it mean any factual or legal issues will be resolved.

This is so because the Complaint was dismissed *sua sponte* before an Answer or other responsive pleading was even filed by the defense. Accordingly, if this Court reverses the dismissal, the action will simply be remanded back to the Superior Court for further proceedings. If that occurs, the litigation will not end.

Instead, the case will continue forward. Defendants/Appellees will remain free to raise any/all defenses they may have, including the same defense that formed the basis for the original *sua sponte* dismissal order. In that event, and as explained further *infra*, all the time and money spent on this appeal will have accomplished nothing, providing zero benefit to either party, and zero benefit to the lower court.

The second option is to simply stay this appeal, revest jurisdiction in the Superior Court, and send this case back for further development of the record. The net effect of this is literally to give Appellant the identical relief he would receive if he prevailed in this appeal. The only difference is that the parties will save thousands of dollars in fees and months waiting for this Court to issue what can only amount to a limited advisory ruling on a hypothetical, non-dispositive point of law.

The record (and error) here is clear: the trial court initially granted in part and denied in part a Motion to Dismiss for Lack of Personal Jurisdiction brought by Defendants/Appellees Travis and Mariel Grant. The court found Mrs. Grant was not subject to personal jurisdiction in Arizona, but her husband, Travis Grant, was subject to jurisdiction here. That should have been the end of the analysis, because at that time, the Rule 12(b)(2) challenge to personal jurisdiction was the only substantive matter pending. No Rule 12(b)(6) or Rule 12(c) motion was ever filed.

Despite this, after ruling on matters of personal jurisdiction, the Superior Court went off the rails: without any advance notice to the parties, the court *sua sponte* dismissed the entire Complaint for one reason—because it found Plaintiff's claims were barred by federal law, specifically the Communications Decency Act (CDA), 47 U.S.C. § 230(c)(1) (the "CDA"). In effect, the trial court brought and then granted its own Rule 12(b)(6) motion *sua sponte*, and it did so without giving notice to the parties that it was considering such action.

There is no question courts have inherent authority to dismiss actions *sua sponte*. However, this Court has generally prohibited *sua sponte* dismissals without prior notice. *See Acker v. CSO Chevira*, 188 Ariz. 252, 255–56, 934 P.2d 816 (App. 1997) (adopting federal standards prohibiting *sua sponte* dismissals without notice, because the "practice 'often leads to a shuttling of the lawsuit between the trial and appellate courts.'") (quoting *Lewis v. New York*, 547 F.2d 4, 6 (2nd Cir. 1976)).

Furthermore, even though the Superior Court's ruling on the CDA may ultimately prove to be substantively correct, it is not possible for this Court to answer that question given the posture in which the ruling was made. This is so due to the generally deferential standards for a Rule 12(b)(6) motion (i.e., well-pleaded facts are assumed true and construed in a light most favorable to the plaintiff). While certainly debatable, the current record is arguably insufficient to support the trial court's CDA decision under a 12(b)(6) standard, at least without additional information and factual development.[1]

[1] Much of the problem here is that Appellant has refused to disclose his identity, and the Complaint contains no information from which Appellant's identity can be ascertained. As such, the record contains no information or evidence showing the *actual* manner in which Appellant's identity was used on Appellee's website. Without that information in the record, it is virtually impossible to evaluate the merits of Appellant's claims or the application of any defenses. Indeed, when a Complaint is based on allegedly unlawful content published on a website, the trial court may ordinarily review the actual web pages for the purposes of a 12(b)(6) motion without converting the motion under Rule 56. *See Knievel v. ESPN*, 393 F.3d 1068, 1976 (9th Cir. 2005). Here, such review is impossible because Appellant has refused to provide the information needed to evaluate his claims.

Moreover, because the Complaint was dismissed without notice and *before* Defendants/Appellees even filed an Answer or raised any affirmative defenses, this appeal cannot and will not address or resolve any of the numerous *other* underlying substantive issues (i.e., whether the Complaint failed to state a claim for reasons unrelated to the CDA). Those matters are simply not ripe for appeal, nor is the record sufficiently developed to allow this Court to consider or decide those issues.

In this posture, even if Appellant "prevails", the result is a foregone conclusion: the case will not end; it will simply be remanded for further proceedings. In that event, the parties and this Court will have essentially accomplished nothing, other than to needlessly waste valuable time and resources.

Thankfully, a simple solution exists for this problem: this Court should suspend the appeal and revest jurisdiction in the trial court for further development of the record. This will permit the parties to raise and litigate all applicable arguments including the CDA, the First Amendment, and other legal/factual points. After these matters are developed and the record is complete, the Superior Court may rule on the CDA and any other matters, it may enter a final global judgment if appropriate, and thereby permit a single, conclusive, and meaningful appeal.

Alternatively, the trial court having improvidently granted Rule 54(c) certification over the objection of Appellees, another reasonable solution is to reverse the grant of Rule 54(c) certification and dismiss the appeal.

II. RELEVANT PROCEDURAL BACKGROUND

A. Parties

Plaintiff/Appellant John Doe ("Doe" or "Anonymous Plaintiff") alleges that in March 2018 he was arrested and photographed by the Maricopa County Sheriff's Office (MCSO). Doe claims MCSO made his "photograph (the 'Mugshot') publicly available on a government website." (IR 1, ¶¶ 25, 26).

Defendants/Appellees Travis Grant, Mariel Grant and Kyle Grant reside in Florida where they operate businesses and websites that archive, index, and republish mugshots and related public records. (*Id*. ¶ 14). The Grants are alleged to have republished Anonymous Plaintiff's Mugshot on their websites. (*Id.* ¶ 28).

B. Material Procedural History to Date.

1. Complaint/Anonymous Plaintiff

In January 2021, Doe filed a Complaint in the Superior Court against Travis Grant, his wife Mariel Grant and Travis' brother, Kyle Grant, alleging claims under Arizona's new "Mugshot Act," A.R.S. §§ 44-7901 and 44-7902. Doe also asserted claims for misappropriation of name and likeness and false light, and he sought injunctive relief as well as "compensatory or statutory damages." (IR 1). Travis and Mariel Grant were served with the Complaint and, in the Notice of Appearance, undersigned counsel expressly reserved on behalf of the Grants "any defenses or objections they may have under Rule 12(b) or any other grounds." (IR 12). To date, Kyle Grant has not been served and did not appear in the proceedings below.

Doe immediately filed a series of somewhat unusual motions, including an *ex parte* "Motion to Waive Appearance and to Proceed Under Pseudonym," which the trial court partially granted even though the motion was never served on Defendants. (IR 13; 2/16/2021 Min. Entry). Later, by minute entry order filed 3/30/2021, the trial court ordered the identity of Anonymous Plaintiff "may be revealed to the Defendants themselves but the Defendants and their counsel are precluded from making any reference to the identity of the Plaintiff in public without further permission of the Court." (IR 42). Despite this, Doe's real name has never been disclosed to Appellees or counsel and is not found in the record below.

On 2/17/2021, Defendants Travis and Mariel Grant moved to dismiss the Complaint, arguing the court lacked personal jurisdiction over them. (IR 18–20). At no time did Defendants seek dismissal under Rule 12(B)(6), nor did they seek judgment on the pleadings under Rule 12(c). Similarly, because they raised a preliminary objection to personal jurisdiction, Defendants never filed an Answer or any other responsive pleading. As such, Defendants never formally raised or pleaded any defenses, simply because it would have been premature to do so at that stage.

Despite this and as noted above, on 4/1/2021, the court issued a minute entry order (IR 46) ruling on matters of personal jurisdiction. Later in that same order, the court *sua sponte* held "The Court agrees that the CDA pre-empts the mugshot act. The Court grants the Motion to Dismiss." (*Id*.) This appeal followed.

However, as noted above, Defendants/Appellees never asked the court to *dismiss* the case based on the CDA. Further, for reasons explained *infra*, the record is arguably insufficient to support dismissal based on the CDA, at least at the present time. Accordingly, this matter is simply not ready for appellate review absent further development of the incredibly sparse record.

2. The Grants' Personal Jurisdiction Moving Papers Expressly Advised the Trial Court The CDA "Need not Be Resolved or Considered at this Point."

To understand *why* the Superior Court erred, it is helpful to briefly review the pleadings leading up to the *sua sponte* dismissal. As noted above, Defendants/Appellees first substantive pleading was a Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction (IR 18–20). In that motion, Defendants' only argument was that the Complaint should be dismissed for lack of personal jurisdiction. No other basis for dismissal was raised or argued.

In their motion, Defendants noted the Complaint sought to exercise personal jurisdiction under two different theories. First, the Complaint invoked jurisdiction under the Mugshot Act's "nexus clause", A.R.S. § 44–7902(A).[2] (IR 1; Compl. ¶ 16). Second, the Complaint separately alleged personal jurisdiction existed "under Arizona's long-arm rule and applicable decisional law." Compl. ¶ 15.

[2] A.R.S. § 44–7902(A) provides: "A mugshot website operator that publishes a subject individual's criminal justice record for a commercial purpose on a publicly accessible website is deemed to be transacting business in this state."

In their motion, Defendants argued the Mugshot Act's nexus clause was unconstitutional, because it sought to impose personal jurisdiction over non-resident website owners/operators based on standards *lower* than required by the traditional "minimum contacts" test. (IR 18 at 10:17–15:4). Separate and apart from that point, Defendants argued the nexus clause was preempted by federal law, specifically 47 U.S.C. § 230(c)(1), because it required treating Defendants as publishers or speakers of pre-existing online information (i.e., mugshots and arrest records previously published on the Internet by the arresting agencies). Finally, Defendants argued personal jurisdiction was lacking under Arizona's long arm rule and the familiar "minimum contacts" standard.

In his opposition to the Motion to Dismiss (IR 29), Plaintiff did not respond to any of Defendants' constitutional arguments. Instead, Plaintiff suggested the court "need not address Defendants' spurious constitutional arguments, as there are other reasonable interpretations of A.R.S. § 44-7902(A) that pose no constitutional question." (IR 29; Opp. at 3:16–18). However, Plaintiff never explained what those "other interpretations" were, nor did he otherwise explain how A.R.S. §44-7902(A) was constitutional.

Instead, Plaintiff devoted nearly his entire argument to explaining why CDA *immunity* did not apply. Indeed, even though Defendants never raised the CDA as a defense to liability, more than half of Plaintiff's brief fell under the heading

"Defendants Are Not **Immune From Liability** Under The Communications Decency Act, 47 U.S.C. § 230". (IR 29 at 9) (emphasis added).

Because Plaintiff was clearly confused about the role the CDA played at this early stage, Defendants' Reply in support of their Rule 12(b)(2) motion sought to clarify that issue. It did so by explaining, several times, that Appellees were only seeking dismissal due to lack of personal jurisdiction, not CDA immunity. Instead, the Reply noted CDA immunity and its impact on liability would be addressed later, only if the Motion to Dismiss for Lack of Personal Jurisdiction was denied:

> Again, although the CDA may (or may not) be an important part of this case for other reasons, it is not relevant to the issue of personal jurisdiction unless the Court finds the Mugshot Act's nexus clause is constitutional. If the Court finds the clause unconstitutional, then it is not necessary to consider the interplay between the CDA and the nexus clause. [fn] Instead, ***the Court need only determine whether personal jurisdiction is proper under Arizona's existing long arm law***, Ariz. R. Civ. P. 4.2(a).

(IR 31 at 4:1–6) (emphasis added).

This same point was repeated in footnote 1 on page 4 of the Reply:

> To avoid any doubt, Defendants are NOT suggesting Plaintiff's claims are not barred by the CDA, only that ***the question of CDA immunity need not be resolved or even considered at this point*** IF the nexus clause is found to be unconstitutional.

The Reply further explained that, because Plaintiff had not tried to show the nexus clause is constitutional, there was no need for the trial court to consider the secondary question whether the clause also conflicts with the CDA. (IR 31 at 11).

Finally, just before the conclusion to the Reply, the trial court was *again* reminded the Grants were not seeking dismissal based on CDA immunity. Rather, the Reply explained the CDA would be fully briefed at a later time, only if the case was not dismissed for lack of jurisdiction:

> But again, ***a full and complete discussion of [the CDA] is both unnecessary at this point*** and would vastly exceed the page limits for this Reply brief (particularly given how broadly erroneous Plaintiff's CDA analysis is). For now, it suffices to say that if this case is not dismissed for lack of jurisdiction, ***Defendants will gladly provide the Court with a full, complete, and accurate response regarding the CDA at the proper time.***

(Id.) (emphasis added).

Despite being *repeatedly* advised Defendants were not seeking dismissal based on CDA immunity, the trial court nevertheless dismissed the case based solely on the CDA, and it did so without any prior notice to the parties.

In this appeal, although Appellees' Rule 12(b)(2) motion only sought dismissal due to lack of personal jurisdiction, Doe states he does *not* intend to challenge the ruling on personal jurisdiction. Instead, Doe's Case Management Statement identifies the CDA as the sole issue raised in his appeal:

> Whether A.R.S. §§ 44-7901, 7902, involving the commercial exploitation of one's arrest information and booking photo, is preempted by federal law, specifically the Communications Decency Act, 47 U.S.C. § 230(c)(1).

Despite this, the record is simply not sufficiently developed to allow this Court to address or resolve this question. Rather, more factual development is required.

III. IT IS APPROPRIATE AND NECESSARY FOR THIS COURT TO SUSPEND THE APPEAL AND REVEST JURISDICTION IN THE TRIAL COURT TO DEVELOP THE RECORD AND AVOID PIECEMEAL APPEALS.

A. Rule 3(b) Permits Suspension of the Appeal for Good Cause.

A trial court loses jurisdiction once an appeal is filed, unless the matter is in furtherance of the appeal. *See Aqua Mgmt., Inc. v. Abdeen*, 224 Ariz. 91, 93, fn 3 (App. 2010). This Court may however, for good cause, "suspend an appeal and revest jurisdiction in the superior court to allow the superior court to consider and determine specified matters." Ariz. R. Civ. App. P. 3(b); *Matter of Condry's Estate,* 117 Ariz. 566, 568 (App. 1977) ("under appropriate circumstances the appellate court may enter an order returning a cause to the trial court for hearing while an appeal is pending"); *Budreau v. Budreau,* 134 Ariz. 539, 541 (App. 1982) (same). The order suspending an appeal may include terms and conditions, such as a date certain for automatic reinstatement of the appeal. *See* Ariz. R. Civ. App. P. 3(b).

B. Good Cause Exists To Suspend The Appeal To Permit Development Of The Record

1. The Current Posture Guarantees Piecemeal Appeals, Even If Appellant Prevails

The general rule in Arizona is that courts disfavor piecemeal litigation. *Edler v. Edler,* 9 Ariz. App. 140, 144 (1969). The Ninth Circuit has also advised courts "cannot afford the luxury of reviewing the same set of facts in a routine case more than once without a seriously important reason." *Wood v. GCC Bend, LLC*, 422 F.3d

873, 882 (9th Cir. 2005). Because piecemeal appeals often arise in the context of Rule 54(b) judgments, such cases are useful by analogy. The Ninth Circuit has cautioned judgments under Rule 54(b) "must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties." *Frank Briscoe Co., Inc. v. Morrison-Knudson Co., Inc.,* 776 F.2d 1414, 1416 (9th Cir. 1985).

Arizona policy also promotes judicial economy and disfavors piecemeal appeals. *See Barassi v. Matison*, 130 Ariz. 418, 421 (1981) ("The underlying rationale of requiring a final judgment for appealability is to avoid the constant disruption of the trial process ... and to promote efficiency, that is, encourage the consolidation in one appeal of all error a litigant feels transpired during the trial.")

Here, the current posture of this case invites (indeed, guarantees) further litigation and piecemeal appeals. As noted above, if this appeal proceeds on the current record, the result will be continued litigation, *even if Appellant wins*.

To summarize, Appellant intends to argue the trial court erred in dismissing the Complaint because, applying a deferential Rule 12(b)(6) standard, the facts and allegations were sufficient to show that CDA immunity did not apply, *assuming those allegations were proven true*. But such a ruling would be effectively meaningless in resolving this case. This is so for at least two different reasons.

First, even assuming the CDA does not apply, there are *multiple* other arguments and defenses which ultimately may be fully dispositive, none of which were ever considered or addressed by the lower court. For example, Plaintiff's primary theory of this case is that the for-profit publication of mugshots and arrest records is *per se* unlawful and is not protected speech under the First Amendment. But that argument has repeatedly been rejected by the United States Supreme Court. *See Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (First Amendment protects publication of information contained in criminal records); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (same). This Court has reached the same conclusion. *See Rodriguez v. Fox News Network, L.L.C.*, 238 Ariz. 36, 39, 356 P.3d 322, 325 (App. 2015) (explaining, "crimes themselves [are] 'events of legitimate concern to the public.' Speech on matters of public concern 'occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'") (emphasis added).

Of course, because it relied solely on CDA immunity, the trial court never reached the preliminary question of whether Appellant's claims were based on constitutionally-protected speech. Without resolving that threshold issue first, it is virtually impossible to determine whether the CDA would apply. And, of course, if the speech *is* constitutionally protected, Appellant's claims will fail for that reason, and the CDA (and any other defenses) would be entirely unnecessary.

Another unresolved issue is this—Appellant previously argued Arizona's Mugshot Act prohibits the publication of any mugshots or criminal record for any "commercial purpose" or "pecuniary gain". *See* IR 8 (Plaintiff's Motion for Preliminary Injunction) at 1 (alleging, "A.R.S. § 44-7902(B) … prohibits a website operator from using criminal justice records, including mugshots, for pecuniary gain.") In response, Appellees explained Appellant had simply misconstrued the text of the Mugshot Act; "Plaintiff … is simply misreading and/or misstating the law, including the Mugshot Act. Contrary to Plaintiff's position, the law does not prohibit the 'commercial' use of mugshots. The law says no such thing." (IR 26 at 2:20–22).

Again, this issue (which turns on the proper statutory construction and interpretation of the Mugshot Act) was never addressed or resolved by the lower court. Without any finding as to the correct construction of the Mugshot Act (i.e., does it prohibit all commercial use of mugshots, or it is less restrictive?), it is impossible to determine whether Appellant has pleaded a *prima facie* claim and/or whether the claim is barred by the First Amendment, the CDA, or other defenses.

These points show how seriously underdeveloped and incomplete the record is in this case, and how premature (if not entirely futile) an appeal would be based on this incomplete record. But the solution is both simple and obvious—this Court should simply stay the appeal pursuant to Civil Appellate Rule 3(b), revest jurisdiction in the Superior Court, and allow the parties to fully develop the record.

2. The Record Is Too Limited for This Court to Properly Evaluate CDA Immunity Without More Information

As noted above, the sole ground for dismissal was CDA immunity (an issue mentioned, but never fully argued or developed, in the narrow context of its impact on personal jurisdiction). But the facts pertaining to the CDA have not been sufficiently developed to allow for appellate review of that issue.

On the one hand, when the application of the CDA is plainly evident from the face of the Complaint and is based on clear and undisputed facts, CDA immunity may properly be raised in a Rule 12(b)(6) motion. *See*, *e.g.*, *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 2007 WL 2949002 (D.Ariz. 2007) (explaining, "Whether it is proper to raise CDA immunity in a Rule 12(b)(6) motion is an open question[]", but agreeing application of CDA was proper in that case); *see also Kimzey v. Yelp! Inc*., 836 F.3d 1263, 1267–68 (9th Cir. 2016) (affirming Rule 12(b)(6) dismissal despite plaintiff's attempt to "plead around" the CDA).

On the other hand, due to the fact-specific nature of the inquiry, some appellate courts have found the CDA cannot be applied without an adequate record. *See Batzel v. Smith*, 333 F.3d 1018, 1035 (9th Cir. 2003) (discussing and adopting new standards for CDA immunity, concluding, "It is not entirely clear from the record whether [the CDA would apply] … under this standard" and as a result remanding case to trial court "for further proceedings *to develop the facts* under this newly announced standard ….") (emphasis added).

Indeed, because the CDA is generally seen as an *affirmative defense*, it is often impossible to evaluate and apply the immunity provisions of that law without first knowing and understanding the precise parameters of the plaintiff's claims. Put differently, CDA immunity often depends on whether or not the defendant's own conduct is unlawful, but when the exact scope and reach of a claim is unclear, that ambiguity must be resolved first before the CDA can be applied.

No better example of this exists than one of the most famous CDA cases—*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) ("*Roommates I"*). In that case, a public interest group sued a roommate-matching website claiming its operations violated the Fair Housing Act.

Before ever testing or questioning the merits of the plaintiff's FHA claims, the website operator raised the CDA as a defense. In effect, the website argued it was protected by the CDA, *assuming (without deciding) the FHA applied to its site.* The trial court agreed, and it held "Roommate is immune under section 230 of the CDA, 47 U.S.C. § 230(c), and dismissed the federal claims without considering whether Roommate's actions violated the FHA." *Roommates I*, 521 F.3d at 1161 (emphasis added).

On appeal, the Ninth Circuit *reversed* in part. This was based on a finding that some of the website's actions violated the FHA. In short, the court found some of the defendant's actions made a "material contribution" to the unlawful nature of the

conduct and thus the CDA did not apply to that extent; "Where it is very clear that the website directly participates in developing the alleged illegality … immunity will be lost." *Id*. at 1174 (emphasis added). But again, the Ninth Circuit's entire CDA and FHA "illegality" analysis *assumed* the FHA applied; at no point did *Roommates I* consider the alternative possibility: that the FHA did not apply to the defendant's website.

Following remand, the district court granted summary judgment in favor of the plaintiff on its FHA claims. Once again, the website owner appealed. *See Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012) ("*Roommates II*").

In the second appeal, the Ninth Circuit began by noting its earlier (2008) decision "was limited to CDA immunity and didn't reach whether the activities, in fact, violated the FHA." Despite this, and contrary to its prior decision in *Roommates I*, the Ninth Circuit eventually concluded in *Roommates II* the FHA did not apply to defendant's website at all. As a result, the court held the defendant's conduct was not unlawful and did not violate the FHA; "As the underlying conduct is not unlawful, Roommate's facilitation of discriminatory roommate searches does not violate the FHA." *Roommates II*, 666 F.3d at 1222.

The lesson to be learned from the 5+ years of wasted litigation in *Roommates I & II* is incredibly important. In plain English, a court cannot begin to determine the

scope of CDA immunity unless it first determines the scope of the underlying unlawful conduct at issue. Put differently, in *Roommates I*, the Ninth Circuit found the defendant lost CDA protection because the court *assumed* the defendant participated in unlawful conduct; i.e., conduct that violated the FHA. But in *Roommates II*, the court admitted its earlier assumption about the FHA was wrong; it found the FHA did not apply at all to the defendant's website; "Because we find that the FHA doesn't apply to the sharing of living units, it follows that it's not unlawful to discriminate in selecting a roommate." *Roommates II*, 666 F.3d at 1222. In other words—***OOPS!***

Viewed another way—*Roommates I & II* underscore a key point: the CDA is simply a defense. But like any other defense, the CDA cannot and should not be considered until *after* a threshold determination has been made finding that the plaintiff has established a *prima facie* cause of action. If the plaintiff has *not* established a *prima facie* claim for any other reason, then the case will fail on that basis, making it unnecessary to even reach the CDA.

Consider this—if the defendant in *Roommates* had simply begun by challenging the legal validity of the plaintiff's FHA claims, the court would have concluded (as it eventually did) that the FHA did not apply to roommate-matching websites. In that case, the case would have ended and the defendant would have won, *without ever invoking the CDA*.

So why does this matter? The answer is simple—in this case, the Superior Court skipped over the first task it should have performed: asking whether Appellant's claims were sufficiently pleaded and otherwise viable. The court never considered, nor did it make, any determination regarding the proper interpretation of the Mugshot Act. Similarly, the lower court never considered whether the First Amendment applied to or protected the speech in question.

Without rulings on those critical threshold issues, this Court will essentially be forced to review the CDA in a vacuum AND while wearing a blindfold. This Court will simply have to *guess* as to the potential viability of Appellant's claims, and it will then have to hypothesize (without any evidence in the record) about whether Appellees did anything to make a "material contribution" to the underlying unlawful conduct.

The Ninth Circuit previously demonstrated the futility of playing a game of judicial "pin the tail on the donkey" in *Roommates I*. This Court should spare its limited resources and not repeat the same mistake.

Instead, this appeal should be suspended, and jurisdiction should be revested in the Superior Court to allow the record to be fully developed. Once that occurs, the Superior Court can evaluate the proper scope of Appellant's claims, determine whether those claims have been sufficiently pleaded, and then, if necessary, apply the CDA and any other defenses as it deems proper.

IV. ALTERNATIVELY, THE COURT SHOULD DETERMINE THAT THE TRIAL COURT IMPROVIDENTLY CERTIFIED THE DISMISSAL UNDER RULE 54(C) AND DISMISS THE APPEAL.

A judgment as to all claims and parties is not final unless the judgment recites that no further matters remain pending and that the judgment is entered under Rule 54(c). *See* Rule 54(c), Ariz. R. Civ. P. Here, Doe initially appealed an unsigned minute entry. This Court stayed the appeal and revested jurisdiction in the trial court "for the purpose of permitting that court to consider a motion by appellant for a signed judgment with a certification of finality pursuant to Rule 54(c)." This Court expressly noted that the Order "does not constitute an expression of opinion by this court on the merits of the motion." (See Order filed 6/14/2021). The Rule 54(c) certification was thereafter improvidently granted.

When the superior court determines the dismissed action is intertwined with other actions "in such a way that an immediate appeal would be inappropriate, the court's inherent power to control the case allows it to decline to certify the dismissal under Rule 54(c)." *Powers Reinforcing Fabricators, L.L.C. v. Contes in & for County of Maricopa*, 249 Ariz. 585, 590, ¶¶ 16-17 (App. 2020)

The Arizona rules do not require the court to enter a judgment under Rule 54–(b) or (c)–"when, in its view, a final judgment is not appropriate at that time." *Id.* A contrary interpretation would be antithetical to "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort

for itself, for counsel, and for litigants." *Id*. (citing *Landis v. N. Am. Co.,* 299 U.S. 248, 254–55 (1936)).

Here, the trial court was urged to deny certification on the grounds that the result would be "a complete waste of everyone's time." (IR 60 at 3:10). The trial court in effect granted a Rule 12(b)(6) dismissal when no Rule 12(b)(6) motion was filed; the basis for dismissal (and the proffered issue on appeal) is CDA immunity, but that issue was not fully briefed or developed.

But as pointed out in the opposition to Rule 54(c) certification and for the reasons explained above, "this waste of time is easily avoidable." (IR 60 at 3:12). Rather than forcing the parties and this Court to waste time on an issue that is not fully developed, the trial court was urged to "simply fix the procedural error now," and grant the pending Rule 60(b) motion and deny Rule 54(c) certification. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994) ("Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal.").

Here, the trial court erred in denying the Rule 60 Motion and in improvidently certifying the judgment under Rule 54(c) because the record is not sufficiently developed to allow for meaningful review. Accordingly, as an alternative to staying this appeal, it is requested that the Court dismiss the appeal as premature.

CONCLUSION

For the reasons above, Appellees respectfully move for an order suspending this appeal and revesting jurisdiction in the trial court for the purpose of developing the record and proceeding with appropriate dispositive motions. Following resolution of those matters, if a final judgment is entered, appellate review may be sought at that time.

Alternatively, it is requested that the Court determine that the trial court improvidently certified the judgment under Rule 54(c) and dismiss the appeal

RESPECTFULLY SUMITTED: September 17, 2021.

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